1963

Guinn Rasbury v. Marvin L. Bainum : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

GUINN RASBURY,
Plaintiff and Respondent,

—vs.—

MARVIN L. BAINUM,
Defendant and Appellant.

Case No. 9836

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third Judicial
District Court for Salt Lake County
Honorable Stewart M. Hanson, *Judge*

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CASE CITED

TEXT

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STATEMENT OF THE KIND OF CASE

By his first cause of action plaintiff, hereinafter referred to as respondent, sued defendant, hereinafter referred to as appellant, for the amount due and owing on a promissory note executed by appellant in favor of respondent in the amount of $3,838.70. Respondent's second cause of action was for the amount of $1,300.00 for accounting services rendered by respondent to appellant. Appellant defendant this action by filing a counterclaim wherein he alleged that respondent had agreed to manage the Tanglewilde Key Club, the country club business owned by appellant, and that respondent should

account to appellant for the alleged management of said business (R. 12, 13).

DISPOSITION IN LOWER COURT

The trial court dismissed respondent's first cause of action and appellant's counterclaim and awarded respondent judgment on respondent's second cause of action.

RELIEF SOUGHT ON APPEAL

Appellant seeks to reverse the trial court's judgment on respondent's second cause of action and for judgment on his counterclaim for $4,300.00 and an order remanding the case to the lower court for an accounting by respondent.

Respondent, by way of cross appeal, asks for a reversal of the trial court's order dismissing respondent's first cause of action and to have the same remanded to the trial court for entry of jugment thereon.

STATEMENT OF FACTS

The contradictions in the record were resolved by the trial court in favor of respondent. A restatement of the facts is required in support of the findings of the court below.

During the year 1958 appellant operated two social clubs in Houston, Texas, known as the Club Silver Key, Inc., a corporation, which was dissolved on May 31, 1958, and the Tanglewilde Key Club, a sole proprietorship,

which was foreclosed November 1, 1958. Respondent is an accountant in Houston, Texas, and as such was requested by appellant in the Spring of 1959 to prepare income tax returns covering the years 1957 and 1958 for the Club Silver Key, Inc. and for the appellant, Marvin L. Bainum, and his wife (Tr. 111).

In the month of July 1958, prior to appellant's request to prepare the aforementioned returns, respondent gave appellant $3,639.77 in exchange for appellant's promissory note in the sum of $3,838.70 (R. 3, Ex. 3). To secure the payment of the note certain accounts receivable of Tanglewilde Key Club were assigned to respondent (Ex. 1). Respondent had no control over the collection of these accounts and, as a result, the monies, if any, that were collected were used for the Club's current operations (Tr. 96, 97, 98, 99). After the Tanglewilde Key Club closed its doors the latter part of October 1958, respondent, at the direction of appellant, collected some unassigned receivables in the amount of approximately $978.58 and applied $709.10 of said amount on the balance appellant owed on a note to one Ed Loraine, upon which respondent was an accommodation endorser, and the remainder of the amount collected, $169.48, was applied on the note in favor of respondent, leaving owing upon it $3,669.92 (Tr. 62, 106, 107, 108, 110, Ex. 4).

In the Spring of 1959 when respondent was requested by appellant to prepare the income tax returns for Club Silver Key, Inc. and the individual returns for Mar-

vin L. Bainum and his wife, and after the monies had been collected and appied on the notes, appellant told respondent that he had done a good job with respect to the collections and acknowledged that he only had respondent's note left to pay (Tr. 109, 110, Ex. 4).

Respondent did not manage, operate or liquidate the country club business owned by appellant nor agree to do any of these things; he acted solely as an accountant for appellant and attempted, at appellant's direction and with appellant's full knowledge and approval, to collect money which was owing to him and Ed Loraine on notes given by appellant to respondent and Ed Loraine (Tr. 48, 50, 75, R. 29).

The pretrial order entered by Judge Ellett on October 31, 1962, provided that:

> "Plaintiff is ordered to furnish defendant all books and records *of the defendant* now in the possession of the plaintiff, and unless he does so at least ten days prior to the date of trial, the *plaintiff will be denied the right to use any of these books and records in connection with establishing his case or any defense thereto.*" (R. 19, 20) (Emphasis added)

At least ten days prior to trial appellant was furnished the records and exhibits relied upon by respondent and which were received in evidence, with the exception of Exhibit 7 which was admitted in evidence by stipulation of counsel (Tr. 124). In addition, the records which were furnished consisted of documents properly to be considered respondent's property (Tr. 89, 105).

Appellant admitted the execution of the note and offered no evidence of payment of same (R. 12). In addition, appellant does not deny that respondent rendered an accounting service for appellant, nor does he deny that the sum of $1,300.00 is reasonable (Tr. 145, 152).

ARGUMENT

POINT I.

THERE IS COMPETENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS WITH RESPECT TO RESPONDENT'S SECOND CAUSE OF ACTION.

The evidence affirmatively discloses, and appellant does not seem to dispute, the services rendered by respondent as alleged in his second cause of action. There was no dispute as to the reasonable value of the services so rendered except by the attempt at offset through the medium of appellant's counterclaim. The judgment in favor of respondent on his second cause of action should be affirmed, the factual matters being peculiarly within the prerogative of the trial court. *Lake v. Pinder* (1962), 13 Utah 2d 76, 368 P.2d 593.

POINT II.

THE DISMISSAL OF APPELLANT'S COUNTERCLAIM AND THE JUDGMENT BASED THEREON SHOULD NOT BE DISTURBED ON APPEAL.

Appellant's counterclaim, which the trial court dismissed, was premised upon the contention that respondent was entrusted with the business of the Tanglewilde Key Club and, being so charged, wrongfully converted to his own use the money and property of appellant in the latter's proprietorship of said club and business (Pretrial Order, R. 19-20).

Appellant admitted that the income tax returns filed in September 1959 for Club Silver Key, Inc., and the individual income tax returns for Marvin L. Bainum and his wife for the years 1957 and 1958 respectively, were completed in every way and that they were signed by him and his wife (Tr. 145, 152). Just above the signature line of the individual income tax return for 1958, which appellant Bainum admits signing, is the following language:

> "I declare under the penalties or perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct and complete return."

Appellant's signature on the income tax return is an admission by him that he knew full well the matters and things pertaining to his business and is incompatible with his claim that he had never received an accounting. For example, the tax return shows that the Tanglewilde Key Club was foreclosed November 1, 1958, and that it suffered a loss of $4,100.24 by virtue of the sale of the

club house, equipment, furniture, land etc. It also shows the amount received by the Tanglewilde Key Club for the year 1958, the cost of goods sold, the gross profit of the business, business expenses and a net profit for the year of $274.36.

The fact that appellant requested respondent in the Spring of 1959 to prepare his income tax returns, and the fact that the returns were not filed until September 1959 after numerous extensions were granted, show a continuing relationship between these individuals after the closure of the Tanglewilde Key Club (Ex. 7). The relationship would not have been a continuing one if what appellant alleged were true, that he had repeatedly requested an accounting from respondent for his alleged management of appellant's business. It is submitted that the only demand that was ever made with respect to an accounting took place after respondent filed this lawsuit and is a familiar defense to suits of this kind.

The admission by Marvin L. Bainum and Nadine Bainum that they were familiar with the information upon which the tax return was based, and the evidence respecting the continuing relationship of these parties after November 1958, puts appellant's counterclaim in the position relegated it by the trial court.

From the foregoing the trial court rightfully concluded that the counterclaim should be dismissed (R. 30), finding in that regard the following:

> "1. That plaintiff was the personal accountant for defendant during the years 1958 and 1959.

2. That plaintiff acted solely as an accountant for defendant and did not agree with defendant to take over, operate or liquidate the Country Club business owned by defendant.
3. That plaintiff has not converted to his own use any money or property belonging to defendant.
4. That defendant has failed to prove facts in support of the allegations set forth in the counterclaim not herein specifically mentioned." (R. 29)

POINT III.

RESPONDENT, NOT HAVING VIOLATED THE PRETRIAL ORDER AND THERE BEING NO EVIDENCE OF PAYMENT OF THE NOTE, IS ENTITLED TO JUDGMENT ON HIS FIRST CAUSE OF ACTION.

The trial court found "that plaintiff has failed to furnish the books and records of defendant as provided in the pretrial order herein and by reason thereof plaintiff has failed in his proof with respect to his first cause of action." (R. 28) The pretrial order stated:

> "The plaintiff is ordered to furnish the defendant all books and records *of the defendant* now in the possession of the plaintiff, and unless he does so at least ten days prior to the date of trial, the *plaintiff will be denied the right to use any of these books and records in connection with establishing his case or any defense thereto.*" (R. 19, 20) (Emphasis added)

After reviewing the evidence which was offered at the trial, it can be seen that respondent did not violate

the pretrial order. The execution of the promissory note, a copy of which was attached to the complaint, was admitted by appellant. The accounts receivable which were assigned to respondent, Exhibit 1, were admitted in evidence at the pretrial hearing. The seven cancelled checks evidencing the consideration for the note, Exhibit 3, were personal records of respondent Guinn Rasbury. Respondent's Exhibit 4, showing the application of the payments on the note, was likewise respondent's personal record (Tr. 105). The income tax returns for 1957 and 1958 for Club Silver Key, Inc. and the individual returns for Marvin Bainum and his wife, Exhibit 5, were respondent's copies of the returns; appellant had in his possession his own copies of same prior to the trial (Tr. 144). A copy of respondent's Exhibit 6 was furnished appellant in October 1961 as part of respondent's answers to interrogatories. A letter dated August 5, 1959, to respondent Rasbury from appellant, a notice addressed to Marvin L. Bainum respecting the filing of income tax returns and a copy of a letter to appellant from respondent Rasbury, Exhibit 7, were admitted in evidence through stipulation of counsel (Tr. 151). In addition, respondent's Exhibits 3, 4, and 5 were given to appellant's counsel ten days prior to the date of trial.

From the foregoing it is clear that respondent was not in violation of the pretrial order; appellant was advised beforehand of the items of proof upon which respondent would rely and respondent did not attempt to establish his case or defend it by use of the books and

records of the Tanglewilde Key Club. The erroneous interpretation of the pretrial order by the trial court constituted error and was detrimental to the respondent.

The admission by appellant of the note established a prima facie case in favor of respondent's first cause of action and the burden of proof to show payment was on appellant (Tr. 114).

> "As a matter of pleading it is necessary for the plaintiff in an action on a bill or note to allege the nonpayment thereof, but it is not necessary for him to support such allegations by any proof other than that which is necessarily attendant on the introduction of the note in evidence or its proof in case the note or bill has been lost or destroyed; the rule is elementary that the defendant in an action on a promissory note who asserts that it has been paid in part or in full, has the burden of proving such payment." 8 *Am. Jur.*, Section 1035, page 518.

Appellant's attempt at offset failed when his counterclaim was rejected by the trial court (R. 23, 24, 25, 27, 28, 29 and 30), and the prima facie case made out by respondent remained, entitling him to judgment on his first cause of action.

CONCLUSION

Appellant attempts in his brief to divert attention from the real issues of this case to the mystery of the lost books and records of the Tanglewilde Key Club and seeks to interject the further irrelevant question of the corporate records of Club Silver Key, Inc., which was dis-

solved May 31, 1958, prior to the execution of the note in question and any of the issues raised by the pleadings in this action. What happened to the books and records of the Tanglewilde Key Club may remain a matter of conjecture since even appellant Bainum did not deny having a key to the office where the books were kept (Tr. 120). The mystery nevertheless is made moot by the pretrial order and the individual income tax return for 1958, which appellant admitted signing.

The evidence is sufficient to support the findings of fact adopted by the trial court in its dismissal of appellant's counterclaim. With the dismissal of appellant's counterclaim, appellant's defense to respondent's first cause of action failed, thus entitling respondent to recover in accordance with the prayer of his complaint.

Respectfully submitted,

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